IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE CIVIL JURISDICTION

FIRST APPEAL NO. 820 OF 1990

The Oriental Fire and General)
Insurance Company. ....).. Appellant.

Versus

1) Smt. Sharada Tukaram Koli)
2) Jawahar Tukaram Koli)
3) Sau. Akkatai Ramchandra Koli)
4) Malhari Sakharam Jadhav)
5) Hasan Chandsaheb Bagwan)
6) Rajuddin Babusaheb Shaikh)
(Nos.1 to 3 Original Petitioners)
and Nos.4 to 6 Original)
Respondents Nos.1 to 3)).. Respondents.

Mr. S. S. Vidyarthi for the Appellant.

Mr. T.S.Ingale with Mr. A. Adusale for Respondent Nos.1 to 3.

Mr. B. A. Valimhe with Mr. R. V. More for Respondent No.5.

Mr. B. R. Patil for Respondent No.6.

CORAM : ANOOP V. MOHTA, J.

DATED : 14TH DECEMBER, 2005.

J U D G E M E N T:

This is the first appeal of The Oriental Fire and General Insurance Company, original respondent No.4, hereby challenge has been made to the Judgment and Order dated 6th September, 1990 passed by the Motor Accident Claims Tribunal, Sangli (Claims Tribunal) whereby an application under Section 110 of the Motor Vehicles Act, 1939 (Motors Act) of respondent Nos.1 to 3 / applicant Nos.1 to 3 has been allowed only against the appellant.

2. The respondent No.4 herein, as a goods carrier was driving truck (MHL - 1194) owned by respondent No.5. Respondent No.6 is subsequent purchaser of the truck. The said truck was insured with the appellant as a goods carrier. The deceased Tukaram, aged 24 years, on 23rd July, 1979 at about 9.00 a.m. left his village Mayani for carrying bricks (Vita) by the truck in question. The said truck met with an accident, as one Ambassador Car was coming in a high speed from the

opposite direction. Both the vehicle were in high speed. The driver, respondent No.4, had suddenly applied brakes and the truck turned in the deep. The deceased who was sitting on the truck was thrown out of the truck and died on the spot on 23rd July, 1979.

3. Respondent Nos.1 to 3, therefore, filed the claim petition in question for Rs.1,20,500/-. The appellant resisted the claim and allegations. Respondent No.6 was added subsequently being purchaser of the vehicle after the accident. Respondent No.5, Hasan, as observed, admitted his responsibility for the accident. The appellant resisted the claim petition by stating that the said goods vehicle truck, was unauthorisedly carrying the passengers on hire or for reward. The policy excludes the carrying of a passenger for reward or hire. As there was a breach of the policy condition, appellant is not liable to pay any compensation. In the alternative they contended that their liability in view of the policy at the most, be restricted to the tune of Rs.50,000/- only.

4. After considering the materials placed on the record, the Claim Tribunal held that the accident took

place due to rash and negligent driving of the truck. The appellant / Opponent No.4 submitted that at the time of the accident truck was used for carrying passengers contrary to the terms and conditions for the insurance policy. The plea of limitation was rejected. The Claims Tribunal therefore awarded Rs.75,000/- to the respondent Nos.1 to 3 / Claimant Nos.1 to 3 only against appellant / Opponent No.4, even though in the reasoning it was specifically observed that the claimants were entitled to recover compensation of Rs.75,000/- from Opponent No.1,2 and 4 jointly and severally. Therefore, this challenge is only by the appellant and not by the other Opponents/respondent Nos.4,5 and 6.

5. Heard learned Counsel appearing for the parties. The liability of the insurance company / insurer, does not cover death or injuries sustained by a person or a gratuitous passenger carried in such a good vehicle (truck) under Section 95(1)(b) of the Motor Vehicles Act, 1939 (now Section 147(1)(b) of 1988 Act). The Apex Court has settled the issues in (1) **Mallawwa & Ors. v/s Oriental Insurance Co. Ltd. & Ors.,** (1999 ACJ 1), **National Insurance Co. Ltd. v/s V. Chinnamma** (2004 (3) T.A.C. 577 (S.C.), (3) **New India**

Assurance Co. Ltd. v/s Asha Rani & Others, (2003 ACJ 1).

6. In view of this settled provisions of law and taking into consideration the admitted position on the record in the present case, there remain no doubt that the deceased was a gratuitous passenger travelling on a goods vehicle. The truck was admittedly, not insured to cover the gratuitous passenger like the deceased. On the contrary there was a specific prohibition as observed by the Tribunal. In this background the learned Claims Tribunal committed error by directing the appellant / Opponent No.4 to make payment to the claimants. The learned Claims Tribunal has in fact observed the joint and several liability of the original Opponent Nos.1,2 and 4 i.e. Driver, owner and insurance company. The direction to recover compensation of Rs.75,000/- only from the appellant is not correct. The learned Claims Tribunal has observed that the insurance policy, Exhibit 96, no way exclude the risk about gratuitous passenger and therefore as per the insurance policy, the appellant / insurance company has been directed to pay the compensation to the claimants. In the present case, admittedly, the deceased Tukaram was not a traveller for hire or

reward. He was a gratuitous passenger. Considering the principles, now as settled by the Apex Court, as referred above, there remained no doubt that the gratuitous passengers like the deceased, if not covered under the policy, the appellant / insurance company cannot be directed to make such payment in view of the breach of the terms and conditions of the policy based on then existing provisions of the Motor Vehicles Act and part from this the above decisions of the Apex Court.

7. Learned advocate appearing for the driver / Opponent No.1, based on the decision of the Supreme Court in **National Insurance Co. Ltd. v/s Baljit Kaur and Ors.** ((2004) 2 SCC 1), contended that as the appellant has already deposited the money in the Claims Tribunal and the same was withdrawn by the respondents / claimants, in such circumstances let this order of the Claims Tribunal be maintained and the appellant be allowed to recover the amount from the owner and/or the driver of the vehicle involved in the accident. Such mode has been recognised by the Apex Court in Baljit Kaur **(supra)**. Therefore, in the interest of justice, so far as the claimants are concerned, they need not be now restricted to recover

the amount and/or balance amount from the original owner or the driver.

8. The learned Advocate appearing for the owner, however, tried to distinguish the Apex Court decisions referred above and submitted that the Apex Court decision especially Mallawwa & Ors. **(supra)** still has considered that on a single occasion or on some stray occasion, if the vehicle carrying passengers for hire or reward that itself should not be treated as a breach of terms and conditions of the policy of insurance, if any. A passenger travelled on such single or some stray occasions should not be treated as gratuitous passenger. He further contended that being the beneficiary legislation, the court should take liberal interpretation and therefore in the present facts and circumstances of the case, this Court need not interfere with the finding and directions given by the Claims Tribunal.

9. As noted, there is no material brought on the record by the owner of the vehicle to justify his case that it was only a single or a stray occasion for the owner or driver to use the vehicle for unauthorisedly carrying such passenger for hire or reward. For want

of material evidence, at this stage it is difficult to consider this submission. There was no such plea raised by the owner. As observed by the Tribunal in fact he had admitted the liability. Therefore, in the absence of specific plea and material in support of the case, this contention of the owner of the vehicle is rejected.

10. The decisions of the Apex Court as referred above itself shows the true and correct interpretation based on the principles applicable to the beneficial legislature but subject to the scheme of the Motor Vehicle Act. Therefore, there is no case made out by the owner and/or driver of the vehicle to justify the impugned judgment and/or directions passed by the Tribunal of recovery of compensation only against appellant / respondent No.4. It is contrary to law and the record. The observations of the Apex Court in **National Insurance Co. Ltd. vs. Bommithi Subbhayamma and others,** (2005 ACJ 721) substantially covers the present case also. The same reads as under:

> "It is, therefore, manifest that in spite of the amendment of 1994 the effect of the

provision contained in section 147 with respect to persons other than the owner of the goods or his authorised representative remains the same. Although the owner of the goods or his authorised representative would now be covered by the policy of insurance in respect of a goods vehicle, it was not the intention of the legislature to provide for the liability of the insurer with respect to passengers, especially gratuitous passengers, who were neither contemplated at the time the contract of insurance was entered into, nor any premium was paid to the extent of the benefit of insurance to such category of people.

The same view was reiterated in **National Insurance Co. Ltd. v. Challa Bharathamma,** (2004 ACJ 2094 (SC)); **Pramod Kumar Agarwal v. Mushtari Begum,** (2004 ACJ 1903 (SC)) and also in **National Insurance Co. Ltd. v. V. Chinnamma** (2004 ACJ 1909 (SC)).

In view of the aforementioned authoritative pronouncements of this Court, the impugned

> judgment of the High Court cannot be sustained which is set aside accordingly. This appeal is allowed. We, however, make it clear that the claimants - respondents will be entitled to recover the amount of compensation granted in their favour by the Motor Accidents Claims Tribunal from the owner of the vehicle."

11. Based on the above principles of law, there is no reason to restrict the liability limited even to the tune of Rs.50,000/-. There is a clear breach of insurance policy and therefore the appellant is not bound to make any payment to the respondents / original claimants. The owner and driver, however, are jointly and severally liable to pay the compensation as arrived at by the Tribunal with interest, as awarded. There is no challenge made by any parties so far as the amount of compensation as awarded by the Tribunal is concerned. The compensation as awarded by the Tribunal therefore remain in tact. However, this should be recovered only from respondent Nos.4 and 5 i.e. driver and owner respectively.

12. As admitted by the parties that the appellant has already deposited the money with the Claim Tribunal as per the impugned order dated 6th September, 1990 and the claimants have already withdrawn the said amount. In this background, in the interest of justice, I am not inclined to direct the claimants / respondents to refund the amount to the appellant. It will be difficult for the claimants now at this stage after 15 years to recover the same from the owner or driver. Considering the submissions raised based on the Baljit Kaur & Ors. I am of the view that the appellant is entitled to recover the amount from the owner and the driver of the vehicle jointly and/or severally, through the executing court without filing a separate suit for recovery of this amount. This course, in the fact and circumstances of the case will serve the interest of justice.

13. Taking all this into account, the impugned judgment and order is modified to the extent that the original claimants / respondent Nos.1 to 3 are entitled to recover compensation of Rs.75,000/- along with the proportionate costs and future interest at the rate of 12% p.a. from the date of the application till realisation of the amount from the respondent

Nos.4 and 5 i.e. driver and the owner of the vehicle in question only and not from the appellant. The rest of the order of the learned Tribunal is maintained with the above observations.

14. The appeal is partly allowed, in terms aforesaid. There shall be no order as to costs.

Sd/-

(ANOOP V. MOHTA,J.)